SUPREME COURT, U. S.

APR 4 1974

MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1973

No. 73-913

DENIS HANLY, et al.,

Petitioners,

vs.

WILLIAM B. SAXBE, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

ALFRED S. JULIEN
Attorney for Petitioners
2 Lafayette Street
New York, New York 10007
(212) 962-8020

(7084) LUTZ APPELLATE PRINTERS, INC.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-913

DENIS HANLY, ET AL., PETITIONERS

v.

WILLIAM B. SAXBE, ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

I

Petitioners' new question - not presented in the petition herein - involving (a) a conflict between the Court of Appeals for the Second Circuit and the Court of Appeals for the Fifth Circuit as to the standard governing judicial review of agency determinations under NEPA, with each court relying upon Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, and (b) a conflict, resulting from said reliance, between, on the one hand, the holding of one or the other Court of Appeals and, on the other, Citizens to Preserve Overton Park, supra.

Because of the extraordinary importance of the question in the administration of NEPA, as well as in judicial review

of agency determinations under NEPA, together with the fact that the question is likely to recur so long as NEPA remains in force and effect, petitioners beg leave, pursuant to the authority of the cases cited in Stern & Gressman, Supreme Court Practice (4th Ed., 1969), pp. 298-299, to add to the three questions which appear in the petition (3-3d), a new question, not set forth in the petition herein, involving (a) a conflict between the Court of Appeals for the Second Circuit (Hanly v. Kleindienst, 484 F 2d 448, 449, and the Court of Appeals for the Fifth Circuit (Save Our Ten Acres, 472 F 2d 463, 465-467) as to the standard regulating judicial review of agency determinations under NEPA, with each court relying for its holding on Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, and (b) a conflict,

resulting from said reliance, between, on the one hand, the decision of one or the other Court of Appeals and Citizens To Preserve Overton Park, supra, on the other hand.

The new question - which is the fourth question presented by petitioners - may be stated in its dual aspect thus:

4 (a) Where a District Court is called upon to review the propriety of (a) a determination by a federal agency that a proposed federal action does not "significantly affect the quality of the human environment" within the meaning of those words in NEPA, and (b) the agency's resulting determination that an environmental impact statement need not be filed, is the standard of review the "arbitrary or capricious" one (adhered to by the Court of Appeals for the Second Circuit),

or the stricter standard of reasonableness, consistent with the Congressional declaration of policy in NEPA that "to the fullest extent possible, the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in" NEPA (adhered to by the Court of Appeals for the Fifth Circuit)?

4 (b) Since each said Court of Appeals relies for its holding on Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, and said reliance must be misplaced in the case of one or the other holding, is the holding of the Court of Appeals for the Second Circuit or that of the Court of Appeals for the Fifth Circuit in conflict with Citizens To Preserve Overton Park v. Volpe, supra?

Facts, and reasons for granting the writ as to the above questions.

The District Court (Tenney, D.J.) held that GSA, in reaffirming its previous findings that the jail (as well as the office building) would not significantly affect the quality of the human environment, did not act arbitrarily or capriciously (Appendix attached to respondents' memorandum, p. 11, second complete paragraph, concluding sentence; p. 12, first complete sentence, and first complete paragraph, concluding sentence; p. 13, penultimate sentence; p. 17, first complete paragraph, concluding sentence).

In applying the "arbitrary or capricious" standard of review, Judge Tenney relied upon Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)

(Appendix attached to respondents' memorandum, pp. 10 and 17).

In affirming the determination of the District Court, the Court of Appeals expressed its approval of Judge Tenney's use of the "arbitrary or capricious" standard of review, saying,

> "Judge Tenney held, quite properly we think, that the General Services Administration (GSA) did not act arbitrarily or capriciously in determining, by a supplemental report filed April 6, 1973, reaffirming previous findings, that the Annex* would not significantly affect the

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*The Annex includes both the jail and office building. Hanly v. Mitchell, 460 F 2d, at pp. 642-643.

quality of the human environment under the National Environmental Policy Act (NEPA), 42 U.S.C. section 4321, and more specifically section 4332(2)(C), as well as under the decisions of this Court in Hanly v. Mitchell, 460 F 2d 640 (2d Cir.), cert. denied, 409 U.S. 990, 93 S. Ct. 313, 34 L. Ed 2d 256 (1972), and Hanly v. Kleindienst, 471 F 2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908, 93 S.C.A. 2290, 36 L. Ed. 2d 974 (1973)."

Hanly v. Kleindienst, 484 F 2d 448, 449, at 449, and Appendix attached to petition, 8a-9a.

While the Court of Appeals, in

applying the "arbitrary or capricious" standard of review, did not state that it was, like Judge Tenney, relying upon Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), supra, it is reasonable to suppose that it did so, since the Court of Appeals, in its previous determination, Hanly v. Kleindienst, 471 F 2d 823 (1972) - which the Court reaffirmed in 484 F 2d, at p. 449) - had also applied the "arbitrary or capricious" standard, and in doing so, had expressly relied upon Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, supra.

However, in Save Our Ten Acres v. Kreger, 472 F 2d 463 (5 Cir., 1973), involving judicial review of the propriety of a determination by a federal agency (GSA) to proceed with the construction of a proposed project (a federal office building in down-

town Mobile, Alabama) without filing an environmental impact statement, on the ground that the building would not significantly affect the quality of the human environment, the Court of Appeals for the Fifth Circuit expressly rejected the concept employed by the Court of Appeals and District Court in the case at bar that the standard of review was the "arbitrary or capricious" one, but held that the standard or test was whether the agency's determination was reasonable in the light of the Congressional declaration of policy in NEPA (42 U.S.C. section 4332, opening sentence) that "to the fullest extent possible, the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in" NEPA. 472 F 2d at pp. 465-7. In so holding, the

Court, curiously enough, expressly relied, in material part, upon Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, supra, the very authority relied upon by the Court of Appeals and District Court in the case at bar in holding that the applicable standard of review was the "arbitrary or capricious" one.

Several months after its decision in Save Our Ten Acres v. Kreger, 472 F 2d 463, supra, the Court of Appeals for the Fifth Circuit expressly reaffirmed the rationale and holding of that determination - more particularly, the correctness of the standard of judicial review of agency action under NEPA employed in that case. Hiram Clarke Civic Club Inc. v. Lynn, 476

F 2d 421, 422, 424-425.*

The conflict between the Court of Appeals for the Second Circuit and the Court of Appeals for the Fifth Circuit as to the applicable standard of review of agency determinations under NEPA, as well as the conflict between those courts as to the meaning, scope and effect of Citizens to Preserve Overton Park, supra, together with the resulting conflict between, on the one hand, the holding of one or the other of those courts, and, on the other, Citizens to Preserve Overton Park, supra, is of such importance in the administra-

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*Tested by the standard of review laid down in Save Our Ten Acres, supra, and Hiram Clarke Civic Club, supra, the determination of GSA in the case at bar - and, correspondingly, the determinations of the District Court and Court of Appeals upholding GSA - cannot, petitioners submit, stand.

tion of NEPA, as well as in judicial review of agency determinations under NEPA, and is so likely to recur so long as NEPA remains in force and effect, that the conflicts urgently require resolution, and certiorari, it is respectfully submitted, should be granted to accomplish said objective.

II

RESPONDENTS HAVE NOT OVERCOME PETITIONERS' SHOWING OF THE EXISTENCE OF A CONFLICT AMONG THE COURTS OF APPEAL AND THE DISTRICT COURTS CONCERNING THE MEANING OF THE KEY LANGUAGE IN NEPA, AND THAT CONFLICT CALLS FOR THE GRANT OF CERTIORARI TO RESOLVE IT (replying to respondents' memorandum, pp. 1-2, 3-4, and in further support of petition, pp. 3-3a, question "1", and 43-52).

Respondents have, in their memorandum, failed to negative the existence of a conflict among various courts of appeal, as well as among divers district

courts (described, Pet., 3-3a, 43-52), concerning the question - and here we state the question somewhat more precisely than the way it is phrased in the petition ("Questions Presented", question "1", pp. 3-3a; "Reasons for Granting the Writ", pp. 43-44) - whether the language in the National Environmental Policy Act (NEPA, section 102(2)(C), 42 U.S.C. section 4332(2)(C), "major Federal actions significantly affecting the quality of the human environment" (which require environmental impact statements) constitutes (1) a unitary or single-test standard: i.e., the use of both "major" and "significantly affecting", etc. is merely for emphasis, so that a "major" federal action ipso facto is one "significantly affecting the quality of the human environment", and thus requires an environmental impact

statement, and, conversely, a federal action which has such an environmental effect is ipso facto "major" in character, and thus also requires such a statement; or (2) whether the quoted statutory language represents a dual or two-test standard: i.e., the action must be shown to be both "major" in character (the term "major" referring to such matters as the cost of the project, the amount of the planning which preceded it, and the time required to complete it; see Hanly v. Mitchell, 460 F 2d, at p. 644), and, apart from being shown to be major, must also be shown to be one "significantly affecting the quality of the human environment" - all in order to require the filing of an environmental impact statement.

Respondents (Memorandum, p. 3) attempt to counter petitioners' claim of

the existence of such a conflict by contending, first, that the cases cited by petitioners as supporting the unitary or single-test standard (Pet., pp. 48-50) "simply assume without discussion that the federal action involved is one that requires a finding regarding environmental impact." But that fact, in the light of the additional fact that in each of those cases, the federal action was admittedly "major" in character, only proves the correctness of petitioners' position: that is, since under the unitary test standard, a "major" federal action is ipso facto one which significantly affects the quality of the human environment (thus requiring an environmental impact statement), it would follow that the cases, as respondents put it, "simply assume without discussion that the federal action is one

that requires a finding regarding environmental impact." Thus, respondents' above-quoted description of the ratio decidendi of these cases, far from refuting the existence of the conflict, only serves to establish it.

Secondly, respondents assert, "Petitioners do not explain why this alleged conflict is significant" (Memorandum, p. 3). It is significant because (a) respondents have conceded that the construction of the jail is a "major" federal action (Hanly v. Mitchell, 460 F 2d at p. 644), and (b) under the unitary test standard described above, a "major" federal action is one "significantly affecting the quality of the human environment," which thus requires the filing of an environmental impact statement.

Third, and finally, respondents

argue that, insofar as concerns the case at bar, the conflict is without relevance because, as respondents assert, "both courts below found that GSA did properly consider (the) question whether the construction of the correctional center would significantly affect the quality of the human environment, and concluded that it would not" (Memorandum, pp. 3-4).

The argument, we submit, misses the point. If, under the unitary test standard, a "major" federal action is one "significantly affecting the quality of the human environment", which requires an impact statement, then, the Court of Appeals' finding that GSA had conceded that the project is a "major" federal action (460 F 2d, at p. 644) and that Court's finding that, nevertheless, the action is not one significantly affecting the qual-

ity of the human environment (and thus an impact statement is not required), represent mutually contradictory and imcompatible findings. This fact, in turn, renders the judgment sought to be reviewed (App., 1a-4a; see opinion, Appendix attached to petition, 5a-13a, 484 F 2d 448) void for vagueness, a doctrine applicable to civil, as well as criminal, cases. Boutilier v. Immigration and Naturalization Service, 387 U.S. 118, 124, to be read with United States v. Cardiff, 344 U.S. 174.

It thus appears that respondents have failed to overcome the showing in the petition of the existence of a conflict among the courts of appeal and the distict courts concerning the meaning of a key provision of NEPA. That conflict, it is respectfully submitted, suggests that certiorari should be granted to resolve it.

III

THE LETTERS SENT BY GSA TO GOVERNOR ROCKEFELLER AND MAYOR LINDSAY CONTAIN DUPLICATE FINDINGS BY GSA UNDER THE INTERGOVERNMENTAL COOPERATION ACT (ICA) AND RELATED REGULATIONS WHICH ARE TANTAMOUNT TO DUAL DETERMINATIONS UNDER NEPA THAT THE PROJECT WILL SIGNIFICANTLY AFFECT THE QUALITY OF THE HUMAN ENVIRONMENT, SO THAT AN ENVIRONMENTAL IMPACT STATEMENT IS REQUIRED. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE QUESTION WHETHER SUCH A FINDING UNDER ICA, ETC. IS EQUIVALENT TO SUCH A DETERMINATION UNDER NEPA (replying to res-

pondents' memorandum, p. 4, and in further support of petition, pp. 3a-3d, question "2", and 53-66).

The point heading above is self-explanatory.

IV

RESPONDENTS HAVE FAILED TO ANSWER PETITIONERS' SHOWING THAT GSA DEPRIVED PETITIONERS OF DUE PROCESS (replying to respondents' memorandum, pp. 4-5, and in further support of petition, 3d, question "3", and 67-78).

The point heading above is self-explanatory.

V

THE RECENT INCIDENT AT THE FEDERAL HOUSE OF DETENTION IN NEW YORK - WHICH THE PROPOSED PRISON IS TO REPLACE - IN WHICH ARMED CONVICT INMATES TOOK GUARDS AS HOSTAGES IN AN ATTEMPT TO BREAK OUT, DRAMATICALLY ESTABLISHES THAT THE PROPOSED PRISON, BORDERING A POPULOUS RESIDENTIAL COMMUNITY, WILL SIGNIFICANTLY AFFECT THE QUALITY OF THE HUMAN ENVIRONMENT, THUS REQUIRING AN ENVIRONMENTAL IMPACT STATEMENT PRIOR TO CONSTRUCTION AND OCCUPANCY OR COMPLETION THEREOF.

Counsel for petitioners recently

forwarded to the Court and counsel for the government newspaper articles concerning the incident which took place within the past two weeks at the Federal House of Detention in Manhattan, which the proposed prison herein is designed to replace. Three convicted bank robbers, being held at the prison, who had managed somehow to obtain guns, seized four prison guards and held them hostage in a desperate attempt to break out. 150 heavily armed police and FBI agents waited outside while the drama inside the prison unfolded. Fortunately, the convicts surrendered and the hostages were released.

The proposed prison herein, which will replace the Federal House of Detention, borders a populous residential community, which includes thousands of the elderly and young. The possibility of a similar

episode taking place at the new prison, and an armed confrontation between armed convict inmates, desperately intent upon gaining their freedom, and a brigade of armed police and FBI agents, desperately intent upon preventing them from doing so, with the accompanying danger of a wild and unpredictable "shoot-out", resulting in injury and death, to police, FBI agents, residents of the neighborhood, passers-by, etc. - all this only serves to dramatize the fact that the proposed prison will significantly affect the quality of the human environment, and that, before construction and occupancy begin or are completed, should an environmental impact statement be filed, so that an informed determination may be made as to whether to proceed or not.

CONCLUSION

A writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

ALFRED S. JULIEN
2 Lafayette Street
New York, New York 10007

Counsel for petitioners

April 2, 1974